the donatar against him, was by collusion, it being only in absence; and the defender omitted to propone his competent exception, that he being *bona fide* possessor, he could not be liable to the donatar for bygones; and the gift being acquired to the defender's behoof, he cannot make use thereof to invert his possession; but his intromission must be ascribed to the apprising, as the most sovereign right, and *sors durior*, to stop the expiring of the legal.——THE LORDS found the pursuer having entered to the possession, by virtue of the apprising, he could not invert the possession, and ascribe the same to the gift of escheat, and that therefore his possession must be ascribed to the apprising. No 66.

Fol. Dic. v. 1. *p.* 599. *Sir P. Home, MS. v.* 1. *No* 462.

1685. *March* 24.

GLENDINNING and MAXWELL *against* GLENDINNING and CARSAN.

THE LORDS advised the count and reckoning pursued by Glendinning and Maxwell, against Glendinning and Carsan; and they found, that a ratification of a wadset right of 3000 merks did not hinder nor debar the granter of the ratification to propone payment upon discharges given by the wadsetter, prior to the said ratification, seeing it was only given in corroboration of the said right; and found these discharges were valid and probative, being between master and tenant, though not signed before witnesses; and that the wadsetter having been once in possession, he could not invert it by designing himself in the discharges only as factor to James Chalmers, an appriser; for though James was preferable, yet the wadsetter should not voluntarily have ceded the possession, unless he had been legally put from it; and they found a note of a messenger's poinding some oxen not sufficient to instruct that the creditor poinded them; because it was not by way of instrument, nor were the letters of poinding produced. No 67.

Fol. Dic. v. 1. *p.* 598. *Fountainhall, v.* 1. *p.* 356.

1686. *December* 7.

Mr GEORGE DICKSON and WILLIAM FOSTER, Writer, *against* Sir GODFREY M'CULLOCH of Ardwal.

IN Mr George Dickson and William Foster, writer, their case against Sir Godfrey M'Culloch of Ardwal, the LORDS inclined to think, a man might defend upon any right he had in his person when he was pursued, and that this was not ascribing his possession to one right more than to another; but if he pursue upon one particular title, as on a gift of escheat, a right of liferent, &c. No 68.

No 68. he cannot afterwards vary so as to ascribe his possession to another title, and pretend he then bruiked by a comprising, because he hath already elected.—See Stair, B. 2. T. 1. § 27.

Fol. Dic. v. 1. p. 599. Fountainhall, v. 1. p. 435.

1710. *June* 16.

JOHN MURRAY, eldest Son to the deceased GILBERT MURRAY of Conheath, *against* JAMES MURRAY, his younger Brother.

No 69.
An appriser having entered into possession of lands, it was found that he could not thereafter invert his possession, and ascribe it to any other title, although such title was in his person prior to the apprising.

IN the action of count and reckoning, at the instance of John Murray, against James, his younger brother, who had accepted a factory from the pursuer, bearing 'power and commission to uplift and manage the rents of the lands of 'Conheath, pertaining to their father, and to submit, transact, compone, and 'agree all pleas, differences, and controversies arisen, or that might arise there-'anent, without prejudice to James, of any acquisition made or to be made by 'him, of the lands and heritages aforesaid, upon his own industry, pains, and 'expense, either before, during, or after the factory;' the LORDS found, That whatever rights the factor acquired of the said lands, conform to the last clause of the factory, viz. 'That his acceptance should not be prejudicial to his acqui-'sitions made or to be made,' must stand good only for a security to him for the sums principal, annualrents, and expenses, and interests thereof, expended by him, in purchasing and prosecuting these rights during the factory; and that upon John Murray's making payment thereof, deducting James's intromissions, the said rights shall be redeemable, and James be holden to denude in favour of the constituent, who must have the benefit of the eases, without prejudice to rights in the factor's person before the factory. Albeit it was *alleged* for James Murray, That since he might accept the factory with what conditions he pleased, *quæ dant legem contractui*, the last clause must operate something, viz. That his acceptance should not oblige him to communicate to John the eases of his acquisitions aforesaid, otherwise it should have no effect, and James should be equally liable as if he had accepted a simple factory; and such a clause is not inconsistent with the nature of a factory, there being mandates *in gratiam et mandantis et mandatarii*. For it was *answered* by the pursuer, That a factor, by the nature of his trust, is obliged to make the best he can of his constituent's pretensions relative to the subject of the factory; Fraser *contra* Keith; No 23. p. 6953.; 15th November 1667, Maxwel *contra* Maxwel, *voce* TRUST. Albeit all factories are not of a like nature, yet the clause founded on by the defender must be held *pro non adjecta*; since it is not only contrary to the very design of the factory, but also to law, *cui non derogatur pactis privatorum*; and is equally reprobated as if a tutor should adject to his acceptance of the office,